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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Inter-Carrier Compensation for	)	CC Docket No. 99-68
for ISP-Bound Traffic	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

CompTel supports the Commission's tentative conclusion that, as a matter of federal policy, inter-carrier compensation for interstate ISP-bound traffic should be governed prospectively by the same framework of *federal rules and state implementation subject to federal review* that currently governs competitive/incumbent LEC interconnection, unbundling and resale arrangements. However, CompTel emphasizes that its support for the Commission's tentative conclusion is contingent upon the Commission's (1) establishing a framework for ISP inter-carrier compensation in which the *same rate structure and level* apply to local and ISP-bound call termination, and (2) subjecting state-level negotiations, arbitration and rate-setting to *explicit national rules* designed to offset disparate ILEC bargaining power and safeguard against cost study arbitrage and discrimination.

Most significantly, CompTel submits that any inter-carrier compensation mechanism adopted by the Commission must be founded on a rule which requires that ISP-bound and local traffic be treated the same. Because the network functionalities employed and costs incurred in terminating a call remain the same, regardless of the jurisdictional classification of a call, compensation rates for local and ISP-bound traffic should not differ.

Applying the same TELRIC-based rate to local and ISP-bound call termination will (1) promote efficient competition in the market for ISP-bound customers, (2) serve as a check on ILEC gaming of call termination and UNE rates, and (3) eliminate the need to impose new regulatory and technological burdens involved with separating and measuring ISP-bound traffic, which, if imposed, would drive up LECs' costs of terminating such traffic. CompTel believes that any increased costs associated with terminating ISP-bound traffic likely will be passed through to ISP customers and, if passed through again, will result in higher Internet access rates

for consumers. Thus, CompTel opposes isolating ISP-bound traffic and subjecting such traffic to a bifurcated compensation rate structure.

To ensure the establishment of economically rational call termination rates nationwide, CompTel submits that explicit federal rules are necessary. In addition to the basic rule that ISP-bound and local calls must be treated the same for call termination compensation purposes, CompTel believes that several additional rules must be adopted to guard against ILEC cost study arbitrage and discrimination. Accordingly, CompTel submits that Commission should adopt the following rules for inter-carrier compensation for ISP-bound calls.

- *Compensation for ISP-Bound and Local Call Termination Must Be Set at the Same TELRIC-Based Rate*
- *Arbitration Awards and Inter-Carrier Compensation Rates Must Reflect the Fact that Costs Are Incurred in Terminating ISP-Bound Traffic and Compensation Is Owed*
- *Compensation Arrangements Must Be Symmetrical*
- *CLECs May Rely on ILEC Traffic Termination Cost Studies – or They May Choose to Conduct Their Own TELRIC Call Termination Studies*
- *Federal Proxies Constitute a Floor for Presumptively Reasonable Compensation Rates*
- *Section 252(i) Rights Apply – Negotiated Terms Must Be Nondiscriminatory*
- *The Commission's Accelerated Docket and Section 208 Complaint Processes Are Available to Carriers Seeking Resolution of Disputes Over Inter-Carrier Compensation for ISP-Bound Traffic*

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To: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"),[1] by its attorneys, hereby submits these comments on the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") released on February 26, 1999 in the above-captioned docket.[2]

Introduction

On February 26, 1999, the Commission released a Declaratory Ruling regarding the jurisdictional nature of dial-up traffic terminated to Internet Service Providers ("ISPs").[3] In that Order, the FCC concluded that dial-up traffic terminated to ISPs is jurisdictionally mixed and appears to be largely interstate.[4] The Commission further concluded that there currently is no

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1 CompTel is the principal national industry association representing competitive telecommunications carriers and their suppliers. CompTel's 335 plus members include large nationwide companies as well as scores of smaller regional carriers.

2 *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) (*"NPRM"*).

3 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) (*"Declaratory Ruling"*).

4 *Id.* ¶¶ 1, 12.

federal rule governing inter-carrier compensation for this traffic and requested comment on how to establish an appropriate compensation mechanism.[5]

Given the Commission's currently effective decision to declare ISP-bound traffic to be jurisdictionally interstate, CompTel agrees with the Commission's conclusion that adopting rules governing inter-carrier compensation for ISP traffic would serve the public interest. Further, CompTel believes that efficient competition would be bolstered and the public interest would be served best by the Commission's adoption of a mandatory compensation framework which recognizes that the terminating function performed on interstate ISP-bound traffic does not differ from that performed on local calls. In short, all terminating minutes are essentially the same and compensation should not vary depending on the jurisdictional nature of a call.

I. COMPENSATION FOR ISP-BOUND AND LOCAL TRAFFIC SHOULD BE TREATED THE SAME

CompTel believes that the foundation of any inter-carrier compensation mechanism which the Commission chooses to adopt must be a federal rule which establishes that, for local and ISP-bound traffic, the terminating function does not differ and, for ratemaking purposes, the two types of traffic should be treated the same. Adoption of a federal inter-carrier compensation rule based on the "minute is a minute" principle will ensure that call termination for all types of traffic is priced efficiently. As CompTel sets forth below, for technical, economic and practical

5 *Id.* ¶¶ 9, 21, 22. Although CompTel believes that the Declaratory Ruling is incorrect, both from a legal standpoint and on public policy grounds, it *assumes* for the purposes of these comments that such traffic is subject to federal jurisdiction. Nothing herein, however, should be construed as an endorsement of that conclusion or a waiver of CompTel's rights with respect to the Declaratory Ruling. In particular, for purposes of clarity only, CompTel herein refers to calls subject to Section 251(b)(5) as "local" calls and calls terminating at ISPs as "ISP-bound" calls. Use of this terminology is not meant to imply that ISP-bound calls are not local calls.

reasons, the Commission should conclude that a single rate structure and level must apply to inter-carrier compensation for terminating local *and* ISP-bound calls.

A. Compensation Rates for Local and ISP-Bound Traffic Should Not Differ Because the Call Termination Function Remains the Same Regardless of the Jurisdictional Nature of a Call

Neither the transport and termination functions performed *nor* the costs associated with them vary based on the jurisdictional nature of a call. Indeed, the Commission's recent declaration that ISP-bound calls are interstate in nature has had no effect on the way in which incumbent local exchange carrier ("ILEC") and competitive local exchange carrier ("CLEC") network engineers handle and exchange this type of traffic. Local and ISP-bound traffic termination involve the same network functionalities, regardless of whether the former class of calls is classified as being jurisdictionally intrastate and the latter interstate. Termination requires (1) interconnection with the originating carrier, (2) transport to the CLEC's "end office" serving the customer, (3) switching or processing at the end office, and (4) termination on facilities purchased by the customer. Because call termination for local and ISP-bound calls is functionally equivalent, CompTel submits that the way in which carriers should be compensated for terminating such traffic should be the same. One rate structure and level should be negotiated, arbitrated or, as is most likely to be the case, *set* for call termination rates for both local *and* ISP-bound traffic.[6]

[6] As CompTel members continue with the process of negotiating and arbitrating their second round of interconnection agreements with the ILECs, it has become quite evident that reciprocal compensation rates generally are not negotiated. Instead, the rates set in state commission generic costing dockets – or in some cases, separate arbitrations in which the requesting party had no chance to participate – are the only rates that are offered or considered by ILECs.

Notably, the Commission's recent jurisdictional declaration also has not changed the fact that in many if not most instances, ILECs are unable to distinguish ISP-bound traffic from local traffic. This is primarily because local and ISP calls are indistinguishable from a network functionality perspective. Moreover, there has never been a sound technical reason to separate the traffic and ISP-bound traffic has always been treated as local traffic by the Commission, its state counterparts, and by ILECs and CLECs alike.[7] CompTel believes that neither the Commission's jurisdictional declaration, nor any other reason, compel alteration of this long standing treatment. If ISP-bound traffic is not subject to the federal access charge regime (and the Commission has made clear that it is not),[8] and, if the network functions performed in terminating ISP-bound traffic are the same as those performed in terminating local traffic, then it makes sense, from an economic and technical policy perspective, to adopt a federal rule requiring inter-carrier compensation rates for ISP-bound traffic termination to be equivalent to those imposed for traffic that is deemed to be jurisdictionally "local" in nature.

Based on this analysis, CompTel respectfully disagrees with the Commission's observation that "efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures."[9] While CompTel does not disagree with the Commission's observation that parties may reasonably agree on alternative compensation arrangements,[10] CompTel submits that there are no technical or network-based

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7 *Declaratory Ruling,* ¶¶ 5, 23, 24.

8 *Id.* ¶¶ 16, 20, 23; *NPRM* ¶ 34.

9 *NPRM,* ¶ 29.

10 *See id.*

reasons for treating ISP-bound traffic termination differently from local traffic terminated to end-users with large inbound calling volumes (*e.g.,* computer support services, customer service centers, radio stations and travel agents) or long hold times (*e.g.,* computer support services, customer service centers, chatlines, and conference calls).[11] As CompTel discusses below, the burden of identifying, separating and measuring calls based on these – or any other – traffic patterns would be substantial and costly. Moreover, in the case of ISP-bound traffic, these additional costs likely would be passed through to ILEC and CLEC ISP customers, which, if passed through again, ultimately would result in higher Internet access rates for consumers. For these reasons, CompTel opposes isolating ISP-bound traffic and subjecting it to a bifurcated rate structure.[12] The same per minute rate structure and level should apply to all traffic termination functions, whether local or interstate ISP-bound, and regardless of whether large inbound calling volumes or long hold times are involved.

B. Applying the Same TELRIC-Based Rate to Local and ISP-Bound Call Termination Will Promote Efficient Competition in the Market for ISP Customers

The same economically sound cost causation and recovery principles which form the foundation of the pricing rules adopted by the Commission in its implementation of the local competition provisions of the 1996 Act also suggest that applying the same total element long-

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11 Carriers always have treated ISPs as end users. As the Commission noted in its "Fact Sheet" on ISP traffic, "ISPs simply purchase phone lines from the local phone company as any local business would do." *No Customer Per-Minute Charges to Access ISPs*, FCC Fact Sheet, www.fcc.gov/Bureaus/Common_Carrier/Factsheets/nominute.html, at 2 (Mar. 1, 1999). Carriers serving ISPs select the facilities used to serve them based upon the same factors used for any high volume business: bandwidth needs, traffic volume, and customer location. Thus, the network costs of serving an ISP mirror those of a similar high volume local customer.

12 *See NPRM,* ¶ 29.

run incremental cost ("TELRIC") based call termination rate to local *and* ISP-bound traffic is the "correct" outcome here, from an economic policy and consumer perspective.[13] By adopting a federal rule requiring that local and ISP-bound traffic termination compensation be treated the same, the Commission will ensure that the TELRIC standard will apply to compensation for terminating ISP-bound calls. Importantly, the Commission already has determined that TELRIC pricing will promote efficient competitive entry and competition, which will in turn expand consumer choice, spur innovation, and move end user prices toward cost.[14] There is no reason to doubt that the same conclusions are valid with respect to the potential effect of adopting a TELRIC pricing mandate for inter-carrier compensation for ISP-bound calls. Thus, CompTel submits that, because TELRIC-based inter-carrier call compensation is likely to promote competition for such traffic, and, in turn, have a downward impact on the Internet access rates and expand Internet access options offered to end users, the Commission should require that the same TELRIC-based compensation rate be applied to local and ISP-bound call termination.

[13] Eventually, this same rate also should apply to terminating exchange access for interstate calls. A minute is a minute – the jurisdictional nature of traffic does not affect the way in which costs are incurred.

[14] *E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 679, 705 (1996) (*"Local Competition Order"*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997) (*"CompTel"*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997) (*"Iowa Utils. Bd."*), *aff'd in part and reversed in part sub nom. AT&T v. Iowa Utils. Bd.,* 119 S. Ct. 721 (1999).

C. Applying the Same Rate to Local and ISP-Bound Call Termination Will Serve as a Check on ILEC Gaming of Call Termination Rates

Compelling support in favor of adopting a federal "minute is a minute" compensation rule also arises from the fact that such a rule will serve to check ILEC incentives to game the application of the TELRIC methodology and may help to reduce the imbalance in bargaining power between competitors and incumbents. Adopting a rule which requires application of the same costing methodology used to determine call termination rates will promote local competition in three ways. First, it will improve the balance in bargaining power among CLECs and ILECs by giving CLECs additional leverage in negotiating cost-based call termination compensation arrangements with ILECs. Because CLECs can deliver millions of minutes of terminating traffic, ILECs should respond by replacing uneconomic and excessive reciprocal compensation rates with termination rates *for all types of traffic* which much more closely approximate costs and are consistent with the FCC's proxies. Faced with numerous state commission decisions requiring them to compensate CLECs for the termination of ISP-bound traffic at the local reciprocal compensation rate, certain ILECs already have moved to lower reciprocal compensation rates. Unless local and ISP-bound traffic are treated the same for call termination compensation purposes, the existing competition-driven incentive to lower local reciprocal compensation rates will disappear and ILECs will endeavor to keep them uneconomically high.

Second, use of a common TELRIC methodology will check ILEC incentives to engage in cost study arbitrage. Application of TELRIC to UNE and all call termination rates could limit an ILEC's ability to treat costs differently from one function (or jurisdiction) to another. An ILEC's costing methodology should be applied consistently to all terminating functions and cannot vary on the basis of whether costs studies will be used in setting rates resulting in inbound or outbound payments. Thus, any attempts to manipulate the TELRIC methodology for the sake of lowering call termination rates for ISP-bound calls also could have an effect on UNE cost studies and, from the ILEC perspective, could lead to the undesirable consequence of driving UNE rates lower. Because it would be difficult for ILECs to conceal (or justify) adjustments made solely to call termination cost studies, CompTel believes that its proposed rule requiring the same rate for local and ISP-bound traffic will serve to promote efficient pricing for all interconnection and unbundling purposes, thereby speeding the development of local competition.

Third, another check that results from Commission adoption of CompTel's proposed same rate rule is that, under such a rule, ILEC cost studies will remain the presumptive proxy for other carriers' costs.[15] In its *Local Competition Order,* the Commission noted that use of the ILECs' costs studies has many advantages. First, because (1) an ILEC and an interconnecting CLEC are likely to serve the same geographic area, and (2) the TELRIC methodology is forward-looking, application of TELRIC should produce results that are substantially the same for each carrier.[16] Second, rate symmetry will reduce the ability of ILECs to use their superior bargaining power to force excessively high termination rates – or, for traffic expected to be principally outbound from the ILEC, excessively low rates.[17] This approach also is administratively easier because it avoids requiring competing carriers to conduct separate cost studies.[18] Of course, as with local call termination, a competing carrier that believes its costs are

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15 *Local Competition Order,* ¶¶ 1085-89.

16 *Id.* ¶ 1085.

17 *Id.* ¶ 1087.

18 *Id.* ¶ 1088.

higher than those of the ILEC should continue to have the opportunity to present a TELRIC study to demonstrate such costs.[19]

D. Applying the Same Rate Will Eliminate the Need to Impose New Regulatory Burdens Which Would Drive Up the Cost of Internet Access

In addition to the foregoing technical and economic justifications, one of the most compelling arguments in favor of subjecting local and ISP-bound traffic to the same compensation structure and level is that doing so eliminates the need to develop systems to measure and separate ISP-bound traffic. Separation and measurement of ISP-bound traffic involves functions which most ILECs and CLECs presently cannot perform and which would cost too much to develop. CompTel emphasizes that any alternative inter-carrier compensation mechanism which permits *different* rate structures and levels for local and ISP-bound traffic, by necessity, would impose considerable new regulatory burdens on incumbents and competitors alike. Traffic separation and measurement cannot be accomplished without incurring additional and perhaps significant equipment, personnel and reporting costs. If these costs are assigned and recovered consistently with the Act, new traffic separation and measurement regulatory requirements will result in higher end user fees to ISPs and, if passed through, higher Internet access rates for consumers. Such a result is anathema to the Commission's advanced services and universal service mandates and is otherwise largely unthinkable in today's political climate.

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[19] *Id.* ¶ 1089.

II. INTER-CARRIER COMPENSATION SHOULD BE SUBJECT TO FEDERAL RULES AND GOVERNED BY INTERCONNECTION AGREEMENTS NEGOTIATED AND ARBITRATED UNDER SECTIONS 251 AND 252

CompTel supports the Commission's tentative conclusion that, as a matter of federal policy, inter-carrier compensation for interstate ISP-bound traffic should be governed prospectively by the same framework of *federal rules and state implementation subject to federal review* that currently governs competitive/incumbent LEC interconnection, unbundling and resale arrangements.[20] However, CompTel emphasizes that its support for the Commission's tentative conclusion is contingent upon the Commission's (1) establishing a framework for ISP inter-carrier compensation in which the same rate structure and level apply to local and ISP-bound call termination, and (2) subjecting state-level negotiations, arbitration and rate-setting to explicit national rules designed to offset disparate ILEC bargaining power and safeguard against cost study arbitrage.[21]

CompTel makes its support for the Commission's tentative conclusion "contingent" because, as noted earlier, CompTel members' experiences in negotiating, arbitrating and renegotiating interconnection agreements reveal that rates for interconnection, unbundling and reciprocal compensation are rarely "negotiated". Instead ILECs offer state commission set and approved rates – or interim rates subject to replacement by state commission approved rates – which competitors have no choice other than to accept. In short, ILECs have little incentive and CLECs have little leverage to bargain on rates for call termination, regardless of the

20 *See NPRM,* ¶ 30.

21 *NPRM,* ¶ 34 ("Although many such disputes could be resolved through a negotiation and arbitration process, we seek comment on whether there are any issues under our two proposals above that we can and should address in the first instance through rules rather than through arbitration. We request parties to comment on the need for rules pertaining to such matters and, to the extent that parties believe that rules are appropriate, the substance and degree of specificity of such rules.").

jurisdictional nature of such traffic. Thus, the Commission's tentative conclusion "that a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation" completely ignores the reality of how interconnection agreements are arrived at in today's incumbent-dominated marketplace.[22] Although CompTel agrees that parties should be free to negotiate nondiscriminatory and symmetrical rates that take into account various factors related to the exchange of ISP-bound traffic, as well as other factors related to the dynamic created by the parties' attempt to reach a broader agreement, the Commission must recognize that, under its proposed framework, rates for inter-carrier compensation for ISP-bound traffic likely will be set by the state commissions.

In recognition of the fact that state commissions are likely to be setting inter-carrier compensation rates under the Commission's proposed framework, CompTel believes federal rules must be adopted to (1) ensure that the same rate structure and level applies to local and ISP-bound call termination, (2) offset disparate ILEC bargaining power, and (3) safeguard against cost study arbitrage. CompTel submits that its "strong federal rule" framework for state commission approved ISP inter-carrier compensation rates is supported by the approach the Commission generally has taken in implementing the local competition provisions of the 1996 Act. Indeed, in the wake of the Supreme Court's recent affirmation of this approach,[23] the

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22 *See NPRM,* ¶ 29. This is not to say, however, that market forces have had no impact on the rates set by state commissions. Indeed, they have (or, perhaps more accurately, they have affected the way in which ILECs conduct the cost studies upon which those rates are based). For example, certain ILECs that appear to be in the process of "correcting" cost-based termination rates down to approximately $0.003 (from roughly a penny a minute).

23 *AT&T v. Iowa Utils. Bd.,* 119 S. Ct., 721 (1999).

Commission correctly concluded that *strengthening* its national collocation rules was necessary to eliminate barriers to entry erected by ILECs on a state-by-state basis and to accelerate the pace and expand the scope of efficient local competition.[24] Here, too, strong national rules are necessary to promote competition and to establish a baseline for negotiation, arbitration and state commission rate-setting. As the Commission previously has found, establishing a firm national baseline speeds competitive deployment by reducing business uncertainty which results in an expansion of the amount of capital available to competitors, levels disparate ILEC bargaining power, and reduces wasteful litigation by limiting the number of issues to be settled in each state.[25] Moreover, this approach also leaves actual rate-setting to the states (subject to FCC and federal court review) which have accrued substantial experience and, in many cases, valuable expertise in reviewing ILEC cost studies.

In sum, the FCC, having asserted federal jurisdiction over ISP-bound traffic, now has the responsibility to ensure that an economically rational compensation mechanism is implemented. Absent federal rate prescription, strong federal rules are necessary to ensure that economically rational compensation arrangements are in place nationwide. Without strong federal rules, the morass of litigation over compensation for ISP-bound traffic termination will only thicken, rates for ISP-bound traffic will be uneconomically high, and efficient competition in the market for ISP-bound traffic will only be delayed. CompTel respectfully reminds the Commission that it is consumers who ultimately will pay the price for both. By acting affirmatively and prudently, the

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24 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, First Report and Order, ¶¶ 18, 23-24 (rel. Mar. 31, 1999).

25 *See Local Competition Order,* ¶¶ 53-62.

Commission can circumvent litigation and ensure that state level negotiation/arbitration and rate-setting for ISP-bound inter carrier compensation reaches an economically rational result.

III. EXPLICIT NATIONAL RULES MUST GUARD AGAINST COST STUDY ARBITRAGE AND DISCRIMINATION

As explained above, CompTel submits that the framework for inter-carrier compensation for ISP-bound traffic should be founded on a rule which recognizes that the functionalities involved in terminating local and ISP-bound traffic do not differ, and sets compensation for call termination at the same rate structure and level, regardless of the jurisdictional nature of the traffic involved. Due to disparate ILEC bargaining power, limited resources at some state commissions, *and* the compelling public policy interest in ensuring that this component of Internet access is priced in an economically rational manner, CompTel believes that several additional federal rules are necessary to govern – and facilitate – the negotiation/arbitration/rate-setting process that will take place at the state level. Prudent and proactive Commission action at this juncture can curb litigation and spur competitive deployment of Internet access facilities. To aid the Commission in this effort, CompTel proposes the following rules.

A. Rule: *Compensation for ISP-Bound and Local Call Termination Must Be Set at the Same TELRIC-Based Rate*

As set forth in Section I of these comments, CompTel believes that any inter-carrier call termination compensation mechanism must be anchored by a rule which recognizes that call termination functions do not differ based on the jurisdictional nature of the call, and requires payment of the same compensation rate for local and ISP-bound traffic.

B. Rule: *Arbitration Awards and Inter-Carrier Compensation Rates Must Reflect the Fact that Costs Are Incurred in Terminating ISP-Bound Traffic and Compensation Is Owed*

In the Declaratory Ruling, the Commission correctly concluded that costs are incurred in terminating ISP-bound traffic and that, under the Act, compensation is owed.[26] Although parties, for various reasons, arguably could negotiate to forego assessment and collection of call termination compensation, CompTel submits that, because costs are incurred, neither the FCC/federal arbitrator nor a state commission/state arbitrator may *set* call termination compensation for ISP-bound – or any other kind of traffic – at zero. To ensure that proper attention is paid to setting the right rate – CompTel proposes that the Commission codify this principle in the form of a federal inter-carrier call termination compensation rule.[27]

C. Rule: *Compensation Arrangements Must Be Symmetrical*

Although parties may negotiate call termination rates that are not cost-based, CompTel submits that all compensation arrangements must be symmetrical. As the Commission found with regard to reciprocal compensation for local call termination, adopting a symmetry requirement will help offset disparate ILEC bargaining power.[28] A symmetry requirement also will help guard against politically influenced uneconomic rate-setting by arbitrators and regulators. In this regard, CompTel notes that "bill and keep" can only be an option when traffic is roughly in balance. As is the case with local reciprocal compensation (and for the same reasons), bill and keep is not an option – and has never been an option – when exchanged traffic is out of balance. In addition, CompTel requests that the Commission reaffirm the applicability

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26 *See Declaratory Ruling,* ¶¶ 7, 9, 21; *see NPRM,* ¶ 29.

27 CompTel notes that carriers are free to *negotiate* bill and keep arrangements.

28 *Local Competition Order,* ¶ 1087.

of its rule establishing a CLEC's right to call termination compensation at the tandem rate, if the CLEC's switch serves a geographic area comparable to that served by the ILEC's tandem.[29]

D. Rule: *CLECs May Rely on ILEC Traffic Termination Cost Studies – or They May Choose to Conduct Their Own TELRIC Call Termination Studies*

To guard against ILEC cost study gaming, the Commission should reaffirm its *Local Competition Order* conclusion that ILEC cost studies may serve as a proxy for other carriers' costs.[30] In reaching this conclusion, the Commission noted that use of ILEC costs studies has many advantages. Perhaps the most compelling of these is administrative efficiency. If done correctly, an ILEC's forward –looking TELRIC study should produce results that largely mirror actual costs for a CLEC serving the same geographic area.[31] Rate symmetry (which results from reliance on the same cost study) also will reduce the ability of ILECs to use their superior bargaining power to force excessively high termination rates for the traffic that is principally outbound in nature and excessively low termination rates for the traffic that is principally inbound in nature.[32] As is the case with local call termination, a competing carrier that believes its costs are higher than the ILEC should continue to have the opportunity to present a TELRIC study to demonstrate such costs.[33]

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29 47 C.F.R. § 51.711 (a)(3); *see also Local Competition Order,* ¶ 1090.

30 *Local Competition Order,* ¶¶ 1085-89.

31 *Id.* ¶ 1085.

32 *Id.* ¶ 1087.

33 *Id.* ¶ 1089.

E. Rule: *Federal Proxies Constitute a Floor for Presumptively Reasonable Compensation Rates*

As an additional check on ILEC incentives to game their TELRIC studies and thereby rig state commission rate-setting, CompTel believes that the Commission should adopt a rule which sets forth that inter-carrier call termination compensation rates set *below* the low end of the FCC's call termination proxies should trigger automatic FCC review for compliance with TELRIC and other FCC pricing guidelines.[34]

F. Rule: *Section 252(i) Rights Apply – Negotiated Terms Must Be Nondiscriminatory*

Although Section 252(i) should not be used to extend agreements in perpetuity, it must be used to guard against discrimination.[35] The ability to "pick and choose" provisions of another carrier's interconnection agreement serves to balance disparate bargaining power and safeguards against discrimination.[36] Indeed, the applicability of Section 252(i) rights is one of the strongest arguments in favor of the Commission's tentative conclusion that inter-carrier compensation for ISP-bound call termination should be governed by interconnection agreements negotiated and arbitrated under Sections 251 and 252 of the Act.[37] By giving competitors the ability to opt-into call termination rates contained in an ILEC's interconnection agreements with other carriers, the

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34 *Id.*

35 *See NPRM* ¶ 35 ("We seek comment, therefore, on whether and how section 252(i) and MFN right affect parties' ability to negotiate or renegotiate terms of their interconnection agreements.").

36 *See Local Competition Order,* ¶¶ 1316-17.

37 CompTel also notes that Section 252(e)(2)(A)(i) provides that a state commission may reject negotiated agreements that discriminate against a carrier that is not a party to the agreement. 47 U.S.C. § 252 (e)(2)(A)(i).

Commission will safeguard against discrimination and will level the playing field for smaller competitors.[38]

G. Rule: *The Commission's Accelerated Docket and Section 208 Complaint Processes Are Available to Carriers Seeking Resolution of Disputes Over Inter-Carrier Compensation for ISP-Bound Traffic*

CompTel submits that swift and effective dispute resolution mechanisms must be an essential component of any inter-carrier call termination compensation mechanism the Commission adopts. In light of this, and the Commission's assertion of jurisdiction over ISP-bound traffic, CompTel believes that a rule declaring that the Commission's Accelerated Docket and Section 208 complaint processes are appropriate avenues for review of state commission decisions regarding such compensation. Similarly, if one carrier believes that another carrier has failed to comply with its inter-carrier compensation obligations, that carrier should be able to use the Accelerated Docket or Section 208 complaint processes. In addition, the rule should make clear that carriers also may petition the Commission for a declaratory ruling or a cease and desist order.

[38] *See Local Competition Order,* ¶¶ 1313, 1316-17.

Conclusion

For the foregoing reasons, CompTel believes that the Commission should adopt a "strong federal rule" framework for inter-carrier compensation as described herein.

Respectfully submitted,

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